IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 768 OF 1988

The State of Maharashtra. .... Appellant.

Versus.

Nandkumar s/o.Mohan Raut,
Victoria Building, Mogal Lane,
Mahim, Bombay. .... Respondent.
(Org.Accused.)

Shri F.R.Shaikh, A.P.P. for the Appellant.

None for the Respondent.

CORAM ; MRS.RANJANA DESAI, &
ABHAY S. OKA, JJ.

DATED : 13th Sept., 2004.

ORAL JUDGMENT (Per: Abhay S.Oka, J.).

1. This is an Appeal under section 378(1) of the Code of Criminal Procedure, 1973 taking exception to the Judgment and Order dated 30th March 1988 passed by the learned Addl.Sessions Judge, Greater Mumbai. By the said Judgment and Order, the Respondent-Accused was acquitted of the offences punishable under section 302 of the Indian Penal Code ("IPC" for short) and section 27 of the Arms Act, 1959.

2. The charge against the Respondent is that on 21st June 1984 at about 21.15 hours at Mughal Lane,Mahim, Mumbai, in front of Victoria Building, the Respondent committed murder of one Pradeep Narayan Raut by firing shots from a revolver and thereby committed an offence punishable under section 302 of the IPC. The further charge against the Respondent is that he was in possession of and/or used a fire arm in breach of section 27 of the Arms Act, 1959.

3. The prosecution examined 11 witnesses. The case of the prosecution is that the victim Pradeep was walking towards his home in Mogul Lane on 21st June 1984. When he came near the Victoria Building at about 9.15 p.m., the Respondent-accused fired two shots at the said victim Pradeep and ran away. The victim Pradeep was transferred to Hospital where he succumbed to injuries.

4. Shri Shaikh, the learned A.P.P. has taken us through the notes of evidence and other relevant documents. He submitted that atleast one eye witness i.e. P.W.No.3 Waman identified the Respondent. He submitted that evidence of P.W.No.3 is very consistent and there is no reason why P.W.No.3 should not be believed. He submitted that only conclusion which can be drawn after appreciating the evidence is that the

guilt of the Respondent is established beyond reasonable doubt. He, therefore, submitted that the Appeal be allowed and the Accused be convicted for an offence punishable under section 302 of the IPC.

5. We will now refer to the oral evidence on record. P.W.1 Prakash Ayare was proceeding on a motor cycle towards his house. On the way to his house at Mughal Lane, he saw a crowd and when he stepped down to see why the crowd had gathered, he saw the victim Pradeep lying injured. P.W.1 stated that he new Pradeep and he could notice wife of Pradeep in the crowd. He stated that his own brother Sanjay and One Shekhar Raut were also in the crowd. P.W.1 along with his brother Sanjay, the wife of the victim and Shekhar Raut took the victim to KEM Hospital by a taxi. P.W.1 stated that on the way to hospital, the victim Pradeep told him that he has received bullet injuries and thereafter the victim lost his consciousness. P.W.1 contacted Mahim Police Station on telephone from KEM Hospital and subsequently he registered F.I.R. Nothing much turns on the evidence of the said witness in so far as the guilt of the Accused is concerned. P.W.2 Sanjay Ayare stated that on the way to his house, he noticed a crowd near Victoria building and therefore he visited the site. He was also knowing the victim Pradeep and he along with P.W.1 Prakash, Shekhar Raut and the wife of the victim took the victim

to the KEM Hospital.

6. P.W.3 Waman stated that he was employed with Bombay Telephones as a Helper and was doing a part time job with Hemers Industry at Sitaladevi Temple Road, Mahim. He stated that he was a resident of Anuradha Building, Mughal Lane, Mahim, Mumbai. P.W.3 Waman deposed that he was proceeding on foot from Hemers Industry to Shivaji Park by Mughal Lane. On the way he stopped in front of Victoria Building as he met his friend by name Sindhi. He was talking to his friend while standing near dispensary of Dr.Arun when he saw the victim being fired at. He claims to have seen the offender who fired the shots at the deceased Pradeep. He stated that the offender ran away towards eastern direction after firing shots. P.W.3 claims to have ran behind the offender upto a distance of about 100 feet. He stated that the offender was armed with a pistol. He stopped chasing him after a distance of about 100 feet. P.W.3 further stated that no one else tried to obstruct or apprehend the offender. P.W.3 described the offender as wearing a black full pant and full shirt with checks design. P.W.3 further added that the full shirt was of a stripes design and that there was a strip of cloth (patti) covering the chin and cheek of the offender. He deposed that the strip of cloth was of black colour and the offender was wearing a white cap. According to him the

offender's height was about 5 to 6 feet and he was aged about 30 years. He described that the offender was having a fair complexion. He identified the accused in the Court. He claimed to have identified the accused in an identification parade held on 15th November 1984 in the Police station. In the cross-examination P.W.3 admitted that as the assailant was having a pistol in his hand he felt that the assailant was a dangerous man and therefore, he was frightened. In the cross-examination he further admitted that it was not possible for him to state the height of the offender and that earlier statement made that the height of the offender as 5 to 6 feet was not correct. P.W.3 was shown bracketed portion marked "A" in his Police statement dated 22nd June 1984 wherein it is recorded that the Accused was having wheat complexion. He stated that he had told the Police that the accused was of fair complexion.

7. The P.W.No.3 has deposed about the identification parade held in the Mahim Police Station, P.W.3 has stated that he was called to the Police Station one hour before start of the parade. He stated that he was made to wait in one adjacent room before he was taken to the parade room. He further stated that :

"It is correct that while I was waiting in

> the said room the accused was taken by two havaldars from infront of the said room to the parade room. At the time the accused was being taken by two havaldars to the parade room I was satisfied that he was the offender who had assaulted Pradeep."

Apart from the fact that the identification parade was held in the Police Station, P.W.3 admitted that he had opportunity to see the accused when he was being taken to the parade room.

8. P.W.4 is Vishnu who is a draftsman in the office of the Executive Engineer, P.W.D. Bombay, has prepared a sketch of the site of incident. P.W.5 is Dilip Godambe who is the Special Executive Magistrate who allegedly held the identification parade. The said witness had described the manner in which the identification parade was held at Mahim Police Station. In cross-examination, the said witness admitted that there is no mention in the panchanama at Exh.21 that he closed the door and the windows of the parade room or that he stood at the door of the parade room at the time when the suspect was brought from the lockup to the parade room.

9. P.W.6 is one Kishore Narayan Raut. He is the brother of the deceased Pradeep. He stated that the

deceased Pradeep was residing on the ground floor of the building known as Savitri Sadan at Mughal Lane, Mahim, Mumbai. There is a tin shed on the rear side of the said building which was used as servants quarters. The witness stated that the said tin shed was of the ownership of his father and there is a garage adjacent to the said tin shed. He stated that his father had given the said tin shed to the accused and his father. After staying in the said tin shed for about six months the accused left the tin shed. One month thereafter the accused came to his house and gave a threat to the witness and his brother and on 22nd March 1984 wife of the said witness lodged N.C.Complaint with the Mahim Police Station against the accused. In cross-examination the witness has admitted that he does not remember whether the accused at any time gave threat to him personally. He also admitted that he was not aware about the talk which took place between his father and the accused.

10. P.W.7 is Mathew Cosma D'Souza. He claims that he was present near the spot of incident and he was sitting at the relevant time on the platform of Ganpati Temple at Bhaskar Patil Wadi. He stated that he heard sound like crackers from Mughal Lane side when he ran towards the place of offence. At that time he saw one person running towards Bhandar Galli with a pistol in his hand.

He deposed that the person was wearing a white cap and was being chased by one Waman. He also described the offender as of wheat complexion and having height of about 5'-6". He stated that the offender was wearing a black full pant and full shirt and that he was in a position to identify the offender. He stated that he identified the accused in identification parade held at Mahim Police Station. In the cross-examination he admitted that he was knowing the accused by his name and face even prior to the date of incident as accused was residing at a distance of about 2 to 3 minutes walk from his house and that the accused was known to him from his childhood. He admitted that he did not disclose to the Police that the accused was the offender. He stated from 21st June 1984 till the date of holding of the parade on 15th November 1984 he did not disclose to anyone that the accused was the offender. In the cross-examination he stated that he did not identify the accused as offender in the identification parade. He stated that his earlier evidence in this respect was not correct. He stated that he did not identify the accused as the offender in the parade as he was frightened. He admitted that during the period of four years till the date of recording of deposition on 25th March 1988 he did not disclose to any one that the accused is the offender.

11. The next witness is P.W.8 Pratap Janardan Kore. He is the real brother of the wife of the victim. He deposed that there was enmity between the deceased and the Accused over the garage in the compound of Savitri Sadan. Except for the aforesaid statement regarding enmity between the Accused and the victim nothing turns on the evidence of the said witness.

12. P.W.9 is one Shivaji Jaiwantrao Lahade, who is the Sub-Inspector attached to the Mahim Police Station. He investigated the offence under the supervision of one Shankar Raorane who was the Police Inspector attached to the said Police Station. Nothing turns on his evidence in so far as the guilt of the accused is concerned. He has not been cross-examined. P.W.10 Dr.Rajesh Chunilal treated the victim in KEM Hospital. He deposed that when the victim was brought to the Hospital he was examined by Dr.Hillary Nazareth. He deposed that surgery on the victim was performed by Dr.R.D.Bapat and two other Doctors. He proved the case papers which were produced on record as well as the death certificate. He deposed that bullet injuries on the victim were sufficient in ordinary course to cause death. P.W.11 is one Shantaram Dattatraya Raorane is the Police Inspector attached to the Mahim Police Station. He stated that the Sub-Inspector Lahade carried out the investigation under his supervision. He also deposed that the accused

surrendered at the Police Station on 9th November 1984 in presence of his Advocate.

13. We have perused the notes of evidence and other relevant documents on record. So far as the cause of death of the victim is concerned, there seems to be hardly any dispute that he died due to bullet injuries sustained by him. The defence Counsel has not cross-examined Dr.Rajesh Chunilal on this aspect. Therefore, the only question which is to be decided is whether the accused fired bullets at the victim or not.

14. For establishing the involvement of the accused, the prosecution has heavily relied upon the evidence of Waman, P.W.3. There are material contradictions in the evidence of Waman. In examination-in-chief he has given description of the clothes on the person of the accused. He has stated that the height of the victim was 5 to 6 feet. He stated that the accused was of fair complexion. There is serious challenge to his version in the cross-examination by the defence Counsel. In the cross-examination P.W.3 stated that the assailant at the relevant time was at a distance of about 5 feet from the victim Pradeep. He stated that both the victim and the assailant were on his east towards Rautwadi. He stated that on hearing the sound of shots his attention was drawn firstly towards the victim and thereafter towards

the assailant. He stated that he saw the assailant only for ten seconds. In the cross-examination he admitted that his earlier statement in his examination-in-chief that the height of the accused was 5 to 6 feet was not correct. He admitted that there was a strip of cloth covering the chin and cheek of the offender and that he was wearing a cap. He was confronted with his statement recorded by the Police marked "A" in which he has allegedly stated that the offender was having wheat complexion. As far as identification parade is concerned, he has admitted that the same was held in Police Station and when he was waiting outside the room where identification parade was held, the accused was taken by two havaldars to the parade room and he identified the accused as the offender at that time. It is very difficult to believe the version of the said witness. When substantial part of the face of the offender was covered by a black cloth and when he had seen the offender only for 10 seconds, it cannot be accepted that he was in position to identify the offender.

15. The only other witness who claims to have seen the accused is P.W.7 Mathew D’Souza. he also described that the accused was having a pistol in his right hand and he was wearing a white cap and his chin and cheeks were covered by a black cloth. He gave the height of the

accused as 5’-6" and he stated that the accused was of wheat complexion. The witness admitted in his cross-examination that he was knowing the accused by his name and face prior to 21st June 1984. He however admitted that when his statement was recorded by the Police on 26th June 1984, he did not inform the Police that the Accused was the offender. He admitted that till holding of the identification parade on 15th November 1984 he did not disclose to anybody that the offence has been committed by the accused in the identification parade. Though in the examination-in-chief the witness stated that he identified the accused, in the cross-exmaination he stated that he did not identify the accused in the identification parade. He also admitted that during the last four years i.e. from 1984 to 1988 he did not disclose to anyone that the accused is the offender. The evidence of P.W.7 will have to be obviously disbelieved as he claims to know the accused by name and face much prior to the date of offence and admittedly he did not inform the Police when his statement was recorded that the Accused herein has committed the offence. P.W.7 knew the Accused. He ought to have disclosed his name to the Police. In that case there would have been no question of holding identification parade. It is obvious that P.W.7 tried to mislead the investigating agency. The identification parade was

held. Even in that parade, he did not identify the accused. Thus this witness is totally unreliable. Identification of the Accused made by P.W.7 is totally worthless.

16. In so far as the identification parade is concerned, it is an admitted position that the same was held in Police Station and the witness had occasion to see the accused even before the identification parade when two Constables took the accused to the room where the identification parade was held. The witness should have been kept in a separate room from where suspect could not be seen by him. P.W.5 Dilip Godambe is the Special Executive Magistrate who held identification parade. The cross-examination of the said witness discloses that panchanama of the parade does not disclose that he closed the door and windows of the parade room and that he stood at the door of the parade room at the time when the suspect was brought from the lockup.

17. In so far as the identification parade is concerned, the learned trial Judge has rightly held that the same suffers from serious infirmities. Firstly it is held at the Police Station and secondly P.W.3 who has allegedly identified the accused had an opportunity to see the accused being taken from the lockup to the

parade room by two Constables and he claims to have identified the accused when he was being taken to the parade room. The P.W.No.3 Waman identified the accused in the Court. The evidence of identification parade is not a substantive evidence, but its utility is for the purpose of corroboration. In other words, it is utilised for corroboration of sworn testimony of witnesses in Court. The substantive evidence of identification of the Accused comes when a witness identifies the Accused in Court. The Apex Court in a Judgment reported in (1998) 5 SCC page 105 (Sk.Umar Ahmed Shaikh v/s. State of Maharashtra) held that when the accused was already shown to the witness before the trial, the identification of the accused in the Court looses all its value and such identification in Court cannot be the basis for conviction. No fault can be found with the learned trial Judge when he discarded the evidence of identification parade and the evidence of P.W.3 and P.W.7 will also have to be discarded. The identification of the accused is extremely doubtful. Some capital is sought to be made of the fact that the Accused was absconding till 9th November 1984,. However, that by itself is not sufficient to prove the guilt of the accused. Moreover there is no recovery of the weapon allegedly used by the accused.

18. We have perused the impugned Judgment and order.

The view taken by the learned Sessions Judge is a possible view which can be taken on the basis of the evidence on record. Even if it is presumed that another view is possible to be taken on the basis of evidence on record, in an appeal against acquittal, the view which favours the accused will have to be accepted. In the circumstances, there is no merit in the appeal. The Appeal is dismissed. The bail bond furnished by the Respondent-Accused pursuant to action under section 390 of the Code of Criminal Procedure, 1973 stands cancelled.

(Smt.Ranjana Desai, J.)

(Abhay S.Oka, J.)